IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 530

UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFFILIATED WITH THE CONGRESS OF INDUSTRIAL ORGANIZATIONS, UAW-CIO,
Appellant,
vs.
WISCONSIN EMPLOYMENT RELATIONS BOARD and KOHLER CO., a Wisconsin corporation,
Appellees

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

REPLY BRIEF ON BEHALF OF THE APPELLANT

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Appellant files the instant reply to emphasize certain particularly untenable aspects in appellees' position as revealed by their briefs.

I.

THE CONGRESSIONAL INTENT

Appellees attribute to us a concession that the conduct, as alleged by Kohler and as found by WERB actually occurred. We have not made that concession and have refrained from attacking the Wisconsin Board's findings only because this Court is not the appropriate tribunal to do so. Our contention is, rather, that we are entitled to have conduct of the kind claimed to have occurred investigated and regulated by the Federal Board. We are not conceding that NLRB would have necessarily made the same findings. Indeed, this obvious possibility of conflict is the basis of the pre-emption doctrine. Appellees do not further their case when they concede that NLRB might well regulate mass picketing differently from the way it is regulated by WERB. See *Perry Norwell Company*, 80 NLRB 225, 242; *District Council, AFL*, 95 NLRB 969, 999.

But it is, in any event, plain that Congress, in enacting the Taft-Hartley amendments, intended to extend federal regulation over the kind of conduct claimed in this case. Representative Hartley said of the Conference Bill that it "• • • does prohibit mass picketing and use of violence in the conduct of a strike." (*1 Legislative History of the Labor Management Relations Act*, 1947, page 882.) Thus, while Senator Ball might have said that "the mass picketing situation is not a major objective" he cites mass picket lines, assaults, and lack of courage of "many local police officials" as the basis of the need for Section 8 (b)(1) of the Act (*2 Leg. History*, 1020). The fact that the Congress was concerned with non-violent forms of restraint and coercion hardly is a basis for arguing that there was no intent to regulate violence as well.

It is certainly beyond argument that the fundamental purpose of the Taft-Hartley amendments was to balance the Wagner Act by regulating labor organizations, as well as employers, and to regulate coercive conduct of labor organizations because it was believed local police officials frequently refused to proceed against trade unions. It is true that in this connection the continued validity of state laws was discussed but it becomes plain from a reading in context of references to state laws that these were references to the criminal laws. (See, for example, Senator Ball's statement, quoted on page 11 of WERB's brief that: "It is no wonder that local communities and *their peace officers* have been reluctant vigorously to enforce law * * * " (Emphasis supplied.) He obviously did *not* have the Wisconsin Employment Relations Board in mind.)

There is an almost complete dearth of reference to state labor laws and state labor boards throughout the entire Congressional debates except in connection with the "cession proviso" contained in Section 10 (a), and Section 14 (b) which saved state labor laws regulating the union shop. These two provisions represent the legislative judgment as to how state labor laws were to be integrated with the federal statute. Senator Murray said of Section 10 (a):

> "We believe that the clarification in the relations between Federal and State labor relations boards provided for in the bill represents a wise solution to a difficult problem." (2 Leg. History, 1166.)

At most, state labor acts such as the Wisconsin Employment Peace Act were models for the federal amendments. There is certainly no intimation that state labor boards would have concurrent jurisdiction over 8 (b)(1)(a) unfair labor practices but over no others. And it is conceded by appellees that the Wisconsin Act cannot be enforced within

the area of federal jurisdiction *except* as to the narrow area involved in this case.[1]

We recognize that the National Labor Relations Board does not have jurisdiction over such aspects of labor relations as workmen's or unemployment compensation. On the other hand, it seems to us plain from the Federal statutory scheme that unfair labor practices falling within the purview of the Act are to be subject to regulation by a central expert board and are to be treated in an integrated, rather than piecemeal, manner. *Garner v. Teamsters Union*, 346 U. S. 485, 490; *H. N. Thayer Co.*, 99 NLRB 1122, enforced 213 F. 2d 748, (C. A. 1, 1954), cert. denied 348 U. S. 883.

We have pointed out in our main brief (pages 38 to 44) the evils which flow from the piecemeal regulation of labor relations assayed by Wisconsin in this case. With respect to our "novel proposition" that we may advise the Court of a pending NLRB case in which substantially the same facts that formed the basis of the state proceeding are being adjudicated, we respectfully cite *Butler v. Eaton*, 141 U. S. 240; *Craemer v. Wisconsin*, 168 U. S. 124; *Chandler Laboratories, Inc. v. Smith*, 88 F. Supp. 583, 584 (D. C. E. D. Pa., 1950); *U. S. ex rel. Collins v. Aske*, 90 F. Supp. 463 (D. C. W. D. Pa., 1950); *Pennsylvania v. Ashe*, 93 F. Supp. 542 (D. C. W. D. Pa., 1950); *Smith v. Maine*, 94 F. Supp. 688 (D. C. D. Me., 1951). See also *Wigmore on Evidence*, Vol. IX, Section 2579; *Wigmore's Code of Evidence* (3rd edition) p. 540.

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[1] References such as that of Representative Kersten quoted on page 8 of WERB's brief to "that portion which pertains to the validity of State laws" are plainly references to Sections 10 (a) and 14 (b), the "portion" pertaining to state laws.

II.

THE STATE BOARD ORDER SUBSTANTIALLY DUPLICATES THE ORDER NLRB WOULD HAVE ENTERED HAD CHARGES BEEN FILED AND PROVEN BEFORE IT

Appellees make a strenuous, albeit abortive effort to show that there is little, if any, impingement by WERB on NLRB's jurisdiction. They claim that the Wisconsin statute here involved is actually a general police measure designed to protect all the people rather than a labor statute. But an examination of the Wisconsin Statutes reveal that the Chapter here involved in entitled "Employment Relations" and the Sub-chapter, "The Employment Peace Act". Needless to say, the Wisconsin Statutes also include a comprehensive Motor Vehicle Law and Criminal Code.

Appellees also argue that WERB either did or at least *could* engage in regulation which would be beyond the powers of the Federal Board. Thus they note that the Wisconsin Act contains proscriptions against individual employees and "any person", whereas, the Federal Act regulates labor organizations and their agents. But, the section of the Wisconsin Act applying to "any person" [Section 111.06 (3)] was not invoked in this case and the State Board's order is directed against "Respondent Unions, their officers, members and agents". If Wisconsin had wanted to avoid conflict with the Federal Board it should have limited its regulation to individual employees and persons who were not agents of a labor organization.

Wisconsin argues (on pp. 60 ff of its Brief) that it was protecting "persons in their legal rights" rather than employees in their rights under Section 111.04 (which duplicates Section 7 of the Federal statute). But the Wis-

consin Board's conclusions of law (R. 8) find violations of Section 111.06 (2)(a) which, in turn, refers back to the provision corresponding to the Federal Section 7. Is Wisconsin seriously claiming that the "legal rights of persons desiring to be employed by Kohler Company" do *not* include statutory rights of employees similar or identical under State and Federal law. We submit that an examination of the Wisconsin Board's Conclusions and Order clearly reveals that their main thrust is directed towards the protection of employee rights identical to employees' Federal statutory rights. To say WERB's action in this case constitutes primarily protection of the public peace and regulation of traffic is to put the "cart before the horse". These may be incidental consequences of the protection of employee rights. As a matter of fact, the same would be true of a similar NLRB order.

III.

THE DECISIONS OF THIS COURT

In conclusion we note that appellees persist in citing *Allen-Bradley, Briggs-Stratton,* and the *Algoma* case for propositions they do not support. *Allen-Bradley* and the *Briggs-Stratton* case both involved conduct *not* regulated by the Federal Act. That is not the case here. The *Algoma* case involved the Union Shop sections of the Wisconsin Act which the Federal Act (in Section 14 b) expressly saves.

In the instant case, the State attempted to regulate a subject matter regulated by the Federal Act in a manner and by a remedy substantially identical with the Federal remedy. Hence, Wisconsin's action cannot stand.

We shall not burden this Reply Brief by analyzing and distinguishing all the cases cited by appellees in which this Court has upheld state regulation of Interstate Commerce. We note simply that none of these involved an attempt by a state to regulate subject matter regulated by the Federal Government, and to do this by remedies and procedures substantially similar to the Federal remedies and procedures. That is the situation here, and that being so, the Court should apply its well-established rule that where Congress has taken a subject matter in hand and indicated the substantive and procedural law for its regulation, the states may not regulate the same subject matter in duplication or complementation of, or in opposition to, the Federal Law. We quote from *Southern R. Co. v. Railroad Commission*, 236 U. S. 439 cited at p. 39 of Kohler's Brief:

> "The test, however, is not whether the state legislation is in conflict with the details of the Federal law or supplements it, but whether the state had any jurisdiction of a subject over which Congress had exerted its exclusive control."

See also *Houston v. Moore*, 5 Wheat. 1; *Charleston & Carolina R. v. Varnville Co.*, 237 U. S. 597; *Oregon Washington R. Co. v. Washington*, 270 U. S. 87; *Missouri Pacific R. Co. v. Porter*, 273 U. S. 341; *Kelly v. Washington*, 302 U. S. 1.

Respectfully submitted,

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